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Supreme Court of the United States

OCTOBER TERM, 1940

No. 657

WILLIAM J. BRENNAN,

Petitioner,

against

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HAROLD R. OAKES,
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WILLIAM J. BRENNAN, *Petitioner,* *against* THE BALTIMORE AND OHIO RAILROAD COMPANY, *Respondent.*	No. 657

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The questions presented by the petitioner do not merit review, as they are not of peculiar nature nor general importance, and the decision of the Circuit Court of Appeals is not in conflict with the applicable decisions of other Circuit Courts of Appeals nor of this Court.

Facts

The facts are mainly stated in the unanimous opinion of the Circuit Court of Appeals, reported in 115 F. (2d) 555.

In the absence of the conductor and flagman (R. 197), it was the duty of petitioner to remove the derail block from the passing siding (R. 201) and determine if the track

was clear for a safe movement (R. 210). It was his duty to light the lamp in the target of the derail "at the first opportunity" (R. 202), which he did not do (R. 207). While riding the cars back into the siding, it was his duty to watch ahead upon the track and to signal the engineers when to stop (R. 126, 209). It was his duty to *know* that the derail block was off the rail (R. 222), but he did not look to see if it was (R. 114). As there was no light in the target, the engineers were dependent upon petitioner to direct a safe movement onto the passing siding (R. 221).

Aside from the convincing physical circumstances of the condition and position of the derail apparatus following the accident, the petitioner's testimony was so uncertain and his admissions so numerous, as to leave no doubt that the derailment was due solely to the omission of his admitted duties. He testified that when he moved the derail lever from east to west, he "felt as though the derail went over, and heard it going over" (R. 106). He felt the weight of the block as soon as the lever started to go and heard the noise of the derail block going into the socket, when the lever was "pretty nearly half way across" (R. 379). Demonstrations with the derail before the Trial Court and jury clearly indicated that the block will not drop into position off the rail until the lever is forced to the left of the target (R. 1418-1421). Petitioner saw nothing wrong with the track and nothing wrong with the derail, with the exception of the light being out (R. 219). Twenty days after the accident, the petitioner made a statement (R. 790), in which he said: "I thought I did throw the derail, * * * and we just backed in, and we just went off of the derail" (R. 1925); upon being asked when he discovered that he had not thrown the derail, he replied: "When I hit it." and "Yes; I figured maybe I didn't get it over or something;" (R. 1928). He

stated that he didn't know whether he had the derail clear off or not and said: "I pulled the lever; whether I got it off and it went back or not I couldn't say" (R. 1930). The petitioner did not deny the making of the statement in the presence of three people (R. 260), but to questions regarding seeing and talking to them, he responded "not that I remember of," and "not that I know of" (R. 256-260). In a bill of particulars, made twenty months after the accident and bearing the signature of petitioner's attorney (R. 334), it was pleaded that "although the plaintiff threw the lever governing the movement of the said derail in the usual and customary manner to throw the said derail off the said track, the said derail was not removed from said track or rail;" (R. 341). Four months later and two days before the first trial of the action, an amended bill of particulars was served (R. 335, 336), in which it was pleaded that "although the plaintiff threw the lever governing the movement of the said derail in the usual and customary manner to throw the said derail off the said track, the car on which plaintiff was riding in said train was derailed and turned over upon the plaintiff;" (R. 343). Obviously, this amendment was designed to avoid the effect of plaintiff's omissions, and to invoke the rule of *res ipsa loquitur*.

It was undisputed that following the accident, the derail block was found resting in its normal position on top of the rail, as shown by Exhibits B, L and M, with fresh cuts on its bright red surface (R. 1021, 1131, 1174, 1270, 1359, 1687), starting on the gauge line where the flanges of wheels run inside the rail and sliding off the center of block to outside of rail (R. 1500), as shown by Exhibits L and M and the Physical Exhibit N. The movement of the block is at right angles to the rails. When the derail rests in its guide block between the rails, no force applied along the track can

move the derail block transversely to replace it upon the rail (R. 1483), according to all known laws of motion (R.1725).

In his previous statement, petitioner said he supposed the train was backing at about six miles an hour (R. 1938). He testified the speed was about 3 or 4 miles an hour (R. 126, 321). The engineers said the train was backing between 8 and 10 miles an hour (R. 989, 1115). The petitioner said the car on which he was riding went about two car lengths from the time it went off the track (R. 270). The elapsed time he estimated at about ten seconds (R. 268). The part of the train derailed was actually one and one half cars, 63 feet (R. 1077). The petitioner said that after he gave a signal to stop and the brakes were applied, the two engines and three cars should have been stopped in a couple of feet (R. 368). A former engineer of the Pennsylvania Railroad said the stop should have been made in 3 to 4 feet (R. 585), about a revolution of a wheel of 3 feet in diameter, after the stop signal was received (R. 586, 627-632). It was undisputed that it would take 4.4 seconds for the brakes on the head engine to attain maximum efficiency in an emergency application and about .5 of a second additional for each car in the train (R. 1627, 1628). According to standard tables, an object moving at a speed of 4 miles an hour will travel 58.7 feet in ten seconds (R. 1711). The Circuit Court of Appeals held that the opinions of petitioner and his witness did not arise above the level of mere speculation.

I

The doctrine of last clear chance is not applicable.

The decisions are substantially uniform that before this doctrine may be invoked, certain essential factors must be drawn from the testimony. In this case, the respondent

submits that in order to apply the doctrine, it should have appeared that:

1. The negligence of the petitioner had ceased, and thereafter,

2. The engineers became aware of his peril, and

3. In time for them to have stopped the train and avoided his injuries, and

4. It be substantially proven that the engineers had failed to stop within the time necessary following their knowledge.

Chunn v. *City and Suburban Railway of Washington*, 207 U. S. 302, 309;
Southern Railway Company v. *Gray*, 241 U. S. 333, 339;
St. Louis Southwestern Railway Company v. *Simpson*, 286 U. S. 346, 350, 351;
Walker v. *East St. Louis & S. Ry. Co.* (C. C. A. 8), 25 F. (2d) 579;
Woloszynowski v. *New York Cent. R. Co.*, 254 N. Y. 206;
Kansas City Southern Railway Company v. *Ellzey*, 275 U. S. 236, 241;
Iowa Cent. Ry. Co. v. *Walker*, 203 F. 685;
Pennsylvania R. Co. v. *Swartzel* (C. C. A. 7), 17 F. (2d) 869;
Jerrell v. *New York Cent. R. Co.* (C. C. A. 2), 68 F. (2d) 856, cert. denied 292 U. S. 646.

The essential factors for the application of the doctrine are missing from the record. Whether the engineers received a stop signal from the petitioner after the car on

which he was riding left the rails (R. 128), or learned of the derailment through the vibration of the engines (R. 993, 1119), it is undisputed that the lead engineer immediately shut off his throttle and applied the brakes in emergency (R. 993), while the second engineer shut off the throttle and used his independent brake (R. 1120). The petitioner was carried approximately 63 feet beyond the derail (R. 1077), in ten seconds (R. 268). Of this time, it is undisputed that approximately 6.4 seconds were consumed in the release of the air from the train line connecting the two engines and three cars. This left only a minimum space of time for the engineers to comprehend an unexpected occurrence and for the brakes to check the momentum of a train 250 feet in length (R. 320) and weighing 923,400 pounds (R. 317-318). Subsequent tests established that a similar train could not make an anticipated stop upon the rails at the same place in less than 77 feet with the brakes applied at five miles per hour (R. 1584) or in less than 130 feet when the brakes were applied at ten miles an hour (R. 1589). Against such testimony, the assertions of the petitioner that the stop should have been made in a couple of feet (R. 368) and of an ex-engineer unfamiliar with the train or location that the stop should have been made in the revolution of a wheel, afford only speculation and conjecture and do not warrant submission to a jury.

Gunning v. *Cooley*, 281 U. S. 90;
Gulf, Mobile & Northern Railroad Co. v. *Wells*, 275 U. S. 455;
Chicago, Milwaukee & St. P. Ry. v. *Coogan*, 271 U. S. 472;
Southern Ry. Co. v. *Walters*, 284 U. S. 190;
Pennsylvania Railroad Company v. *Chamberlin*, 288 U. S. 333.

II

There was no question for the jury as to the cause of derailment, as the physical facts and credible testimony clearly showed the sole fault was that of petitioner.

The operation of the derail and the guidance of the train were exclusively in the hands of petitioner. There was no evidence of any defect; in fact the petitioner found the derail in good working order and it operated properly both before and after the accident (R. 1546, 1510, 1400). The petitioner at no time stated unequivocally that he removed the derail from the rail. After the accident, it was found upon the rail (R. 1021, 1131, 1174, 1270, 1359, 1687). It had been recently run over and there was no other apparent cause for the derailment. It could only rest upon the rail if the petitioner left it there (R. 1483, 1725). The physical control of the derail rested solely with the petitioner. If the sole cause of the derailment was the act or omission of the petitioner, he cannot recover under the Federal Employers' Liability Act.

Davis v. *Kennedy,* 266 U. S. 147;
Frese v. *Chicago, B. & Q. R. Co.,* 263 U. S. 1;
Great Northern Railway Company v. *Wiles,* 240 U. S. 444;
Sheehan v. *New York, N. H. & H. R. Co.,* 93 F. (2d) 442, cert. denied 304 U. S. 560.

Where the initial cause of the accident is the failure of the injured to perform his duty, the rule of *res ipsa loquitur* does not apply. The plaintiff must prove the negli-

gence of the defendant and that the negligence complained of caused his injuries.

Great Northern Railway Company v. *Wiles,* 240 U. S. 444;
Patton v. *Texas & Pacific Railway Company,* 179 U. S. 658;
Atchison, Topeka & Santa Fe Railway Company v. *Toops,* 281 U. S. 351;
New York Central Railroad Company v. *Ambrose,* 280 U. S. 486;
New Orleans & Northeastern Railroad Company v. *Harris,* 247 U. S. 367;
Minneapolis & St. Louis Railroad Company v. *Gotschall,* 244 U. S. 66, 67.

The testimony of the petitioner that he threw the derail lever in the usual manner was contrary to all physical facts and scientific principles. Where the latter are proven without contradiction, as in this case, it is proper to set aside a plaintiff's verdict and under the new rule (F. R. C. P. 50[b]) direct a dismissal of the complaint.

Redman v. *Baltimore & Carolina Line, Inc.,* 70 F. (2d) 635, 637;
Jacobson v. *Chicago, M., St. P. & P. R. Co.,* 66 F. (2d) 688;
Liggett & Myers Tobacco Co. v. *DeParcq,* 66 F. (2d) 678.

III

Writ of certiorari should be denied.

HAROLD R. OAKES,
Counsel for Respondent.

January 21, 1941.